IN THE

Supreme Court of the United States

October Term, 1977

77-1848

No. 77-.....

GERALD SPRAYREGEN,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner Gerald Sprayregen, defendant below, respectfully prays that a writ of certiorari issue to review the decision rendered by the United States Court of Appeals for the Second Circuit (Mulligan, Van Graafeiland and Kaufman, J.J.) on May 25, 1978, which affirmed a judgment of conviction entered after a trial before Griesa, J., and a jury, in the United States District Court for the Southern District of New York for conspiracy in violation of 18 U.S.C. § 371, as well as violations of 15 U.S.C. §§ 78m(a), 78ff (filing false statements with the Securities and Exchange Commission), 18 U.S.C. § 1014 (making false statements to a bank), 18 U.S.C. § 1341 (mail fraud), and 18 U.S.C. § 1505 (obstruction of justice).

Opinion Below

The opinion delivered in the Court of Appeals is not yet officially reported and is set forth in Appendix A (1a-5a).

Jurisdiction

The judgment of the Court of Appeals, dated and entered May 25, 1978, is set forth in Appendix B (6a).

The jurisdiction of this Court to review the judgment of the Court of Appeals is conferred by 28 U.S.C. § 1254(1).

Questions Presented

1. During summation in a federal criminal case, was it proper for a federal prosecutor, without provocation, repeatedly to express his personal belief and opinion that the defendant was a liar and was lying during testimony given by the defendant in his own defense?

2. If it was improper, during summation in a federal criminal case, for a federal prosecutor repeatedly to express his personal belief and opinion in this regard, then:

(a) Were the defendant's Fifth Amendment rights to testify in his own behalf, and to a fair trial, violated by such conduct in such a manner as to require reversal of his conviction?

(b) Was it error for the Court of Appeals, which twice previously had condemned such conduct by federal prosecutors in its Circuit, and had warned against repetition, nonetheless to affirm the conviction on the ground that the continuing prosecutorial impropriety was "harmless."

(c) Was it proper for the Court of Appeals to disregard such misconduct as "harmless" after that Court of Appeals had been formally promised by the United States Attorney that such misconduct during summation would be policed and ended.

3. Did the application of the "harmless error" rule in this case deprive defendant of his substantial Sixth Amendment right to the effective assistance of counsel in that the two prior admonitions of the Court of Appeals, and the promise of the United States Attorney to that Court, entitled counsel to believe that the defendant could testify in his own behalf without exposure to twice forbidden prosecutorial misconduct which thereafter would be excused as "harmless."

Statutory and Constitutional Provisions Involved

The following statutory and constitutional provisions are involved: United States Constitution, Article 3, Section 2, Clause 3; Amendments V and VI; Rule 52, Federal Rules of Criminal Procedure.

Statement of the Case

At all relevant times the defendant was chairman of the board of Stratton Group, Ltd. ("Stratton"). Stratton was comprised of three divisions, one of which was John's Bargain Stores, a retail merchandising organization.

Stratton was a public company which operated on a calendar year basis. In 1972, its John's Bargain Stores division suffered substantial losses which were concealed in Stratton's unaudited 10-Q financial statements for its first, second and third quarters of operations in 1972, its audited 10-K for its full year ended December 27, 1972, and its unaudited 10-Q for its first quarter of operations in 1973.

Falsity of the various financial statements was not disputed at the trial. The defendant's only defense was that he neither knew of nor participated in the falsifications.

Stratton's comptroller, one Jose Umana, testified that the defendant authorized all of the falsifications.

A second prosecution witness, one Walter Spengler, testified that the defendant authorized the falsification of the 10-Q's for the first, second, and third quarters of 1972, but contradicted Umana and swore that the defendant did not know of the falsification of the audited year-end 10-K.

The defendant testified in his own behalf and denied any complicity.

Both the trial judge and the Court of Appeals found that the determination of guilt or innocence "was one dependent on the jury's assessment of credibility" (4a).

In summation, the prosecutor, over objection, consistently expressed *his* personal belief and opinion that the defendant was a liar on the witness stand and had been lying throughout his testimony. Among the statements of personal belief and opinion were the following:

> It is basically that document, ladies and gentlemen, which marks the beginning of the attempt to cover up Mr. Sprayregen's participation in these crimes, and Mr. Spengler's at that time. It is an attempt which continues, I suggest to you, right up to this very moment as the defendant sits there now. It includes the act which you saw on direct examination and it includes the lies which you saw on cross-examination by Mr. Sprayregen.
>
> MR. FLEMING: I object to that.

THE COURT: Overruled.

* * * *

Then I would ask you to compare that [the testimony of the government witnesses], . . . with the testimony of that man, the defendant, who stood up there—and I don't hesitate—and bald facedly lied to you repeatedly.

* * * *

Ladies and gentlemen, that man would tell you the sky was green if it would permit him to escape conviction here. . . . He will sit there and tell you that your skin is blue if he thinks it will get him off.

* * * *

I ask you, ladies and gentlemen, whose motive in this case was then to tell the truth? Who tried to tell it as best as they can remember it? Who was straightforward and answered questions by both attorneys without being evasive? Who if anyone, just plain lied to you?

* * * *

You contrast the testimony of Mr. Sam Cardiello and the conduct of that man on the stand in this case. It wasn't an innocent man blowing up and laboring under false characterizations. They were outright lies.

* * * *

I couldn't get a straight answer out of him for the life of me, and I ask you, ladies and gentlemen, if he is evading all those things and he is lying about some of the things I have pointed out, what else do you think he is lying about?

Do you think he is lying about the fact that he directed the submission of those false financial statements?

* * * *

Ask yourselves, ladies and gentlemen, why was he lying about that; why was he so anxious to avoid that?

* * * *

Why was he lying. I think it is fairly clear he was lying because he did not want to find out . . . .

* * * *

When Mr. Sprayregen said it was at the accountant's insistence, he was not telling you the truth.

* * * *

Having been caught in a flat-out right lie . . . .

* * * *

I already mentioned to you the flagrant lies about who retained the investigator.

* * * *

Mr. Sprayregen's attempt for keeping Umana around because of the accountants is just so much coverup and you just reject that.

* * * *

That is the most bald faced misrepresentation of a record of facts I can imagine.

* * * *

Mr. Sprayregen was not telling you the truth again, ladies and gentlemen.

* * * *

It is simply not true, ladies and gentlemen.

* * * *

The Court of Appeals found that the summation was improper and in violation of its prior admonitions, but affirmed on the ground that the defendant was not prejudiced.

REASONS FOR GRANTING A WRIT

I. The writ should be granted to settle an important question of constitutional rights in the fair administration of criminal justice. The prosecutor's repeated statements of personal belief and opinion during summation that the defendant had lied on the witness stand violated the defendant's substantial Fifth Amendment right to testify in his own behalf without being exposed to such improper statements, and therefore violated his Fifth Amendment right to due process and a fair trial. It was error for the Court of Appeals to excuse this constitutional violation under the "harmless error" rule. Moreover, these expressions of personal belief and opinion were in contravention of two prior opinions of that Court, and in breach of an earlier promise made by the United States Attorney that such improper statements during summation would be policed and discontinued. By nonetheless excusing such misconduct as "harmless," the Court of Appeals deprived the defendant of his Sixth Amendment right to the effective assistance of counsel as to whether the defendant should testify. Its decision also has created a substantial cloud on the ability of any defense counsel to determine whether a defendant should testify and thereby risk conviction by reason of an improper character assassination which will then be affirmed under the "harmless error" rule.

Well prior to the trial of the case in question, the Court of Appeals for the Second Circuit twice held that it was highly improper for a federal prosecutor, in summation, to state his personal belief that a defendant had

lied during his testimony. On both occasions, that Court directed that the impropriety should not be repeated. *United States* v. *White*, 486 F.2d 204 (2d Cir. 1973), *cert. denied*, 415 U.S. 980 (1974); *United States* v. *Bivona*, 487 F.2d 443 (2d Cir. 1973).

In the *Bivona* case, the Court of Appeals affirmed the conviction only because the United States Attorney promised to stop the misconduct. It stated, 487 F.2d at 447:

> Although we conclude that reversal is not required here, we cannot ignore the numerous departures from approved prosecutorial advocacy which have been called to our attention within the last six months. Thus, we have considered whether the dramatic step of upsetting a conviction is the only feasible way to deter future prosecutorial misconduct. We are not unmindful of Judge Frank's admonition:
>
> "The deprecatory words we use in our opinions . . . are purely ceremonial." Government counsel, employing such tactics, are the kind who, eager to win victories, will gladly pay the price of a ritualistic verbal spanking. The practice of this court—recalling the bitter tear shed by the Walrus as he ate the oysters—breeds a deplorably cynical attitude towards the judiciary.
>
> *United States* v. *Antonelli Fireworks Co.*, 155 F.2d 631, 661 (2d Cir.) (Frank, J., dissenting), *cert. denied* 329 U.S. 742, 67 S.Ct. 49, 91 L.Ed. 640 (1945).
>
> We recognize the profundity of these words and, unless the prosecutor heeds our recent warnings, we may be left with no alternative but to reverse convictions where the argument of the prosecution goes beyond what is permissible and fair. But, we fully expect that our criticism here and in *White* will not fall on deaf ears. Indeed, at oral argument, we were advised by the Chief Appellate Attorney in the United States Attorney's office for the Southern District of New York that he was holding a meeting that very day to discuss our *White* opinion with his staff and to caution against repetition of the statements criticized there. He assured us that judicial admonition, even in the absence of reversal, would discourage and curtail the conduct we censured.

Both after the trial of the instant case, and during oral argument of its appeal, the prosecutor said:

> MR. SIEGEL: Your Honor, I will be very candid with the Court. I, quite frankly, although I read the decision, forgot about it and I will state that had I to do it over I probably would not have used that language.

The Court of Appeals found misconduct, but nonetheless affirmed the conviction on the ground that the misconduct was "harmless." The Court of Appeals said:

> Although we affirm, we do not mean thereby to indicate approval of the prosecutor's conduct (2a).
>
> * * * *
>
> The United States Attorney here certainly did not exercise the restraint appropriate to his office, and his overzealousness contravened our clear instructions in *White* and *Bivona* (4a-5a).

This Court should issue the writ in order to review the conduct in question and to announce appropriate guidelines for the administration of criminal trials. *Berger* v. *United States*, 295 U.S. 78 (1935).

There is substantial reason why a prosecutor should not be allowed to express his personal opinion and belief that a defendant, who has chosen to take the stand, has been a liar during his testimony.

To call a defendant a liar during summation is no different than to express a personal belief that a defendant is guilty, especially where, as here, the issue of guilt or innocence turned on the jury's determination of the credibility of the defendant's word against the word of a principal accuser.

Such expressions of personal belief and opinion also impermissibly raise the possibility that the jury will believe that the government has within its possession evidence of guilt which was not given to the jury, possibly for technical reasons.

Most important, if statements of a prosecutor's personal belief and opinon are countenanced, then a defendant's due process right to testify in his own defense is substantially diminished if not destroyed. If prosecutors are allowed to repeatedly express their opinion that a defendant was lying on the witness stand, then a defendant rationally cannot testify, since no defendant can match his credibility against that of an Assistant United States Attorney. *See, United States* v. *Spangelet*, 285 F.2d 338, 342 (2d Cir. 1958):

> As *Berger* suggests, [a jury may] place more confidence in the word of a United States Attorney than of an ordinary member of the Bar. And it is especially inadmissible for the prosecutor to put into issue his own professional integrity, as was done here.

Such misconduct violates basic Fifth Amendment rights and cannot be excused as "harmless."

The writ also should issue so that this Court may consider whether defendant was denied his Sixth Amendment right to the effective assistance of counsel. Defense

counsel was entitled to rely upon the directions issued by the Court of Appeals in the *White* and *Bivona* cases, and upon the promise made by the United States Attorney in the *Bivona* case, that repetition of the same misconduct would be avoided in the future. Yet, when the defendant did in fact testify, timely objection to the prosecutor's expression of personal belief and opinion was overruled, the defendant was convicted, and the conviction was affirmed on the ground that the prosecutor's summation was "harmless error," though the Court of Appeals found that the prosecutor's "overzealousness contravened our clear instructions in *White* and *Bivona*."

Application of the "harmless error" rule in this fashion should not be permitted and should be rectified by this Court.

We also believe that this Court should measure the adequacy of a system of judicial review which warns the United States Attorney against a repetition of specific misconduct, but then does not reverse convictions in subsequent cases when the precise misconduct recurs. Otherwise, defense counsel can have no confidence that future violations of appellate admonitions will not repeatedly be forgiven under the rubric of "harmless error." It is now impossible, for example, to make an informed decision as to whether a defendant may safely take the stand in his own defense without subjecting himself to the risk of character assassination, and of matching his credibility with that of an Assistant United States Attorney who may call him a liar in summation.

We recognize that this Court may be reluctant to review the discretion of a Court of Appeals charged with responsibility for the administration of criminal trials in its Circuit. We believe however, and submit respectfully, that attention should be paid to the matter by this Court, both for the purpose of the administraion of criminal justice within the Second Circuit, and in order that the

teachings of *Berger* v. *United States*, *supra*, be reaffirmed with regard to all federal prosecutors.

The issue raised here is an important issue which goes directly to the concept of a fair trial which lies at the very heart of our system of justice.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Dated: New York, New York
June 28, 1978

Respectfully submitted,

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APPENDICES

APPENDIX A

Opinion in the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 945—September Term, 1977.

(Argued May 17, 1978 Decided May 25, 1978.)

Docket No. 78-1066

UNITED STATES OF AMERICA,

Appellee,

v.

GERALD SPRAYREGEN,

Defendant-Appellant.

Before:

KAUFMAN, *Chief Judge,*

MULLIGAN and VAN GRAAFEILAND, *Circuit Judges.*

Appeal from a judgment of conviction entered on February 2, 1978, in the United States District Court for the Southern District of New York, Thomas P. Griesa, *Judge.*

Affirmed.

JERRY L. SIEGEL, Assistant United States Attorney (Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, Richard D. Weinberg, Assistant United States Attorney, of counsel), *for Appellee.*

PETER FLEMING, JR., New York, New York (Robert D. Piliero and Curtis, Mallet-Prevost, Colt & Mosle, New York, New York, of counsel), *for Defendant-Appellant.*

KAUFMAN, *Chief Judge:*

Gerald Sprayregen appeals from his conviction on all counts of an 11-count indictment, charging him with the preparation and dissemination of false financial statements relating to the John's Bargain Stores Corp., and with the subsequent concealment of this massive fraud. Specifically, appellant was convicted of submitting materially false financial reports to the SEC, to credit agencies, and to the First Pennsylvania Banking & Trust Co. so that he could receive a loan. Sprayregen now raises two issues on appeal. He contends that the prosecutor's repeated assertions during summation that he was lying contravene this court's holdings in *United States* v. *White*, 486 F.2d 204 (2d Cir. 1973) and *United States* v. *Bivona*, 487 F.2d 443 (2d Cir. 1973). He also argues that, in important particulars, the testimony of two material witnesses for the government differed, and that, to the extent the government disbelieved one of them, it knowingly countenanced the presentation of perjured testimony. Although we affirm, we do not mean thereby to indicate approval of the prosecutor's conduct.

I.

At trial, the government established its case against Sprayregen primarily through the testimony of two witnesses, Jose Umana, the comptroller of John's Bargain Stores, and Walter Spengler, the chain's Vice President of Operations subsequent to 1972. Their testimony, taken, as we must, in the light most favorable to the government, *see United States* v. *Freeman*, 498 F.2d 569 (2d Cir. 1974),

established that, in 1969, a group of investors, including several sympathetic to the so-called Sprayregen interests, acquired control of John's Bargain Stores. Immediately thereafter, this group, and the president of John's, one David Cohen, committed the corporation to an agreement whereby the stores agreed to purchase the appellant's brokerage firm, Sprayregen & Co., for a sum estimated at fifteen million dollars. Suppliers, apparently concerned over the exercise of this "put agreement" and its effect on the corporation's liquidity, commenced refusing credit to the John's Bargain Stores chain consisting of over 200 discount outlets. Throughout 1970, in fact, conditions worsened as store managers, forced to purchase inferior merchandise, found these goods were stagnating on the shelves.

Seeking to revitalize the chain, Sprayregen and Walter Spengler, then newly hired, decided to undertake a "mark down" program, reducing the price of merchandise in an effort to increase volume and generate cash. The amount of reductions was greater than expected, however, and the chain sustained a loss of approximately 1.8 million dollars. The instant criminal action derives from appellant's efforts, along with Spengler and Umana, to conceal this loss through a manipulation of the amount credited to John's Bargain Stores' inventory. When, moreover, it appeared that this fraud was about to be discovered, appellant, in concert with Spengler and Umana, agreed to fabricate a story placing all blame for the fraud on Umana. This false tale was adhered to until Umana and, eventually Spengler, recounted a totally different version of the events concerning John's Bargain Stores, and pleaded guilty to charges relating to the fraud. The appellant, who testified in his own behalf, denied any knowledge of the actions taken at John's to conceal the chain's massive losses.

The case presented to the jury, accordingly, was one dependent on the jury's assessment of credibility. If the jurors credited the testimony of Umana and Spengler, or portions of their testimony, as their verdict indicates they must have, the government's case against the appellant was concededly compelling.

II.

It is in this context that Sprayregen's complaint regarding the propriety of the prosecutor's remarks during summation must be considered.[1] In *United States* v. *White*, *supra*, and *United States* v. *Bivona*, *supra*, we instructed prosecutors to perform their tasks with dignity and self-discipline, and directed them to refrain from expressing their personal beliefs that a defendant is lying. In both cases, however, we noted that the defendant was not prejudiced by the excesses of the government attorney. Although *White* and *Bivona* dealt with relatively short trials, where an intemperate summation would be more likely to influence a jury, we observed that the strength of the government's case and the court's proper instruction to the jury that it was the sole judge of credibility rendered prejudice unlikely. The United States Attorney here cer-

[1] The following are examples of the prosecutor's objectionable statements cited by appellant:

> Ladies and gentlemen, that man would tell you the sky was green if it would permit him to escape conviction here.... He will sit there and tell you that your skin is blue if he thinks it will get him off.

and

> Then I would ask you to compare that [the government's evidence], ladies and gentlemen, with the testimony of that man, the defendant, who stood up there—and I don't hesitate—and bald-facedly lied to you repeatedly.

The prosecutor admitted at argument that, had he been aware of this Court's holdings in *White*, *supra*, and *Bivona*, *supra*, he would have refrained from making these remarks.

tainly did not exercise the restraint appropriate to his office, and his overzealousness contravened our clear instructions in *White* and *Bivona*.[2] Yet, it is even less likely than in *White* and *Bivona* that his remarks occasioned any prejudice to the defendant. The case against Sprayregen was, as we have indicated, an extremely strong one once the jury resolved the issue of credibility against him. Moreover, the summation, which alone took the better part of an afternoon, came at the end of a long and difficult trial, lasting almost four weeks. The jury was to be swayed either by Sprayregen or by the two primary witnesses for the government, and it is unlikely that a few intemperate remarks made in the course of a month trial affected its result.

Sprayregen's second contention is equally without merit. While it is clear that Spengler's recollection did not comport precisely with Umana's, this is hardly a situation where the prosecution knowingly offered false evidence. *See Napue* v. *Illinois*, 360 U.S. 164 (1954); *Giglio* v. *United States*, 404 U.S. 150 (1972). The government presented Umana's and Spengler's testimony to the jury with their inconsistencies openly submitted for its consideration and the jury chose to believe the government's evidence despite the differences. Indeed, it would be far more troubling if the government coached its witnesses to present an identical story.

Accordingly, we affirm.

[2] As we noted, the Assistant United States Attorney admitted on argument that he had not been familiar with these cases. We direct his attention further to Standard 5.8(b) of the A.B.A. Prosecution Standards:

> It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence of the guilt of the defendant.

All prosecutors in this circuit should be guided by this rule in the future.

APPENDIX B

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fifth day of May one thousand nine hundred and seventy-eight.

Present: HON. IRVING R. KAUFMAN
Chief Judge
HON. WILLIAM H. MULLIGAN
HON. ELLSWORTH A. VAN GRAAFEILAND
Circuit Judges

78-1066

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

GERALD SPRAYREGEN,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the Judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court.

A. DANIEL FUSARO,
Clerk

By ARTHUR HELLER
Deputy Clerk

APPENDIX C

Relevant Statutes, Constitutional Provisions, and Rules

FED. R. CRIM. P. 52 HARMLESS ERROR AND PLAIN ERROR.

(a) *Harmless Error.* Any error, defect, irreguarity or variance which does not affect substantial rights shall be disregarded.

(b) *Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

ARTICLE 3, SECTION 2, CLAUSE 3. CRIMINAL TRIAL BY JURY

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any

criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.